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EX PARTE
COMMUNICATION

Marlene H Dortch, Secretary

Federal Communications Commission
The Portals

445 12th Street, S.W., TW-A325

Washington, DC 20554

Re: CC Docket No. 96-128: Certification and Audit Requirements

Dear Ms Dortch:

As requested by the staff, the American Public Communications Council ("APCC") hereby submits its views on the certification and audit requirements that should apply to interexchange carriers ("IXCs") that pay compensation in the event that the Commission adopts a rule that imposes a compensation obligation on switch-based resellers ("SBRs") in lieu of the first facilities-based IXC ("FIXC").

APCC stresses that it has not abandoned or in any way modified its opposition to a SBR-pays rule. APCC continues to believe that a SBR-pays rule is essentially unworkable. In the event that the Commission does adopt such a rule, however, there are a number of requirements that the Commission must impose to limit the abuses, compensation losses, and consequent removal of payphones that would result from a SBR-pays rule.¹

Further, APCC agrees with MCI that the obligation to pay compensation for calls routed to a SBR must remain with the FIXC unless the SBR has complied with certification and audit requirements. See MCI Ex Parte, filed August 19, 2003, entitled "Third Party Verification Procedures as a Condition for SBR Compensation of Payphone Service Providers," at 5, 20. The certification and audit requirements should

¹ Even if the Commission adopts a SBR-pays rule, the rule should apply only to those calls that the FIXC terminates to a SBR's call processing platform, such that the FIXC cannot receive answer supervision from the ultimate called party. In the resale of subscriber toll-free service – *i.e.*, service in which the ultimate called party is a toll-free service subscriber – the FIXCs have claimed that answer supervision for a toll-free call answered by that subscriber is passed back through the SBR's switch to the FIXC. In these circumstances, there is no legitimate reason why the compensation obligation should not remain with the FIXC, and the FIXCs have not contended otherwise.

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include those specified by MCI,² supplemented by the additional requirements described below.

Detailed certification and audit requirements are necessary because experience under the pre-November 23, 2001 rules demonstrates that there is no valid basis for the Commission to presume that SBRs will maintain reliable, accurate call tracking and payment systems. During the pre-November 23, 2001 period, most SBRs that paid any compensation at all did *not* make compensation payments to APCC Services in every quarter of that period. Further, even for those SBRs that did make some sort of payment every quarter, their payment levels often fluctuated in unexplainable ways. SBRs that failed to pay compensation in a particular quarter often "discovered" call records for that quarter after they were threatened with suit, but of course there is no reason to believe that a carrier that failed to make any payment at all would have nonetheless retained accurate compensation records.

SBRs frequently profited from their failure to maintain adequate compensation systems. SBRs that were too small to justify the cost of a lawsuit could successfully avoid paying any compensation at all. SBRs that were sued were unlikely to end up paying more compensation than they owed, because PSPs could not prove with any precision the call volume handled by a SBR, and were likely to settle the case for less than the amount they guessed that the SBR owed. Since the FCC did not bring forfeiture proceedings, SBRs incurred no penalty for their malfeasance or nonfeasance, other than the payment of interest on the amount of compensation reflected in the settlement.

If the Commission decides to adopt a SBR-pays rule, PSPs' compensation collection difficulties will once again increase exponentially.³ Therefore, the Commission must impose rigorous qualification requirements on SBRs seeking to take responsibility for paying compensation.

² As APCC stated in a previously submitted *ex parte*, the certification standards advocated by MCI should be applied even if the Commission retains the FIXC-pays rule. In that event, the Commission should require FIXCs to apply those standards in evaluating their SBR customers' ability to provide accurate information identifying complete and incomplete calls originating from payphones. See APCC *Ex Parte* filed September 8, 2003, entitled "APCC's Response to IXCs' Positions on the Tollgate Issue," at 2-3.

³ The overwhelming collection problems experienced by PSPs under the SBR-pays system were described in detail in APCC's comments and reply comments in this proceeding. See Comments of APCC, filed June 23, 2003, at 5-11 and Exh. 2; Reply Comments of APCC, filed July 3, 2003, at 19-27 and Exh 1.

I. CERTIFICATION REQUIREMENTS FOR SBRs

The SBR, through an officer, must certify, under penalty of perjury, that it has the capability to track all calls that reach its call processing platform from payphones, to maintain records of both compensable and non-compensable calls, to administer payment of compensation to every PSP from whose payphones it receives compensable calls, and to comply with the information disclosure requirements adopted by the Commission. The certification should include a complete and detailed description of the systems and methods used to ensure accurate tracking of and payment for compensable calls.⁴ The certification must be submitted to the Commission, so that the Commission itself can verify which IXC's are subject to compensation obligations and have implemented the capability to comply.⁵ As Qwest stated in its *ex parte*, the Commission should specifically require truthful certifications, and should prosecute false or misleading certifications just as it would prosecute other instances of misrepresentation or lack of candor on the part of regulated entities. *See* Qwest *Ex Parte*, filed August 28, 2003, entitled "Qwest Discussion," Sec. III.a.4

The certification must be submitted at least annually, to ensure that IXC's maintain their compensation systems despite changes in personnel, ownership, financial reverses and the like. The record is clear that SBRs frequently exit the market or fail to maintain payment systems. For example, of the 109 small SBRs and IXC's that paid some compensation to PSPs during the period from October 1, 1997 through September 30, 2001, only 9 paid compensation for every quarter of that period. To ensure that compensation obligations do not remain with the SBR if it fails to maintain the integrity of its compensation system, the SBR's certification should be valid only for the four quarters immediately following the certification. For example, if the SBR submits a certification on October 15, 2003, then the SBR is responsible for paying compensation on calls routed to its platforms during all four quarters of 2004. If a SBR

⁴ See Section II, below. A mere general certification has very limited value. For example, various local exchange carriers ("LECs") certified in 1997 that they had complied with the Commission's "new services test" method for pricing payphone line service to PSPs, without submitting any detail about how they had complied. In fact, few if any of the certifying LECs had correctly applied the new services test. *See generally Wisconsin Public Service Commission*, 17 FCC Rcd 2051 (2002). In the wake of that decision, a number of LECs entered settlements with PSPs resulting in substantial reductions in payphone line rates. Even before the Wisconsin decision, several state public utility commissions issued decisions finding that LECs had failed to comply with the new services test. *Id.*, n 10. Therefore, SBRs must be required to specify in the certification the particular steps they have taken to comply.

⁵ In the interests of uniformity, it may be that similar certification and audit standards should apply to FIXCs. Of course, FIXCs must be held responsible in any event for paying compensation on calls handled within their networks, and on calls routed to SBRs that do not provide the required certification and audit. Therefore, FIXC compliance with such standards would not be a prerequisite for the imposition of a payment obligation on the FIXC.

ceases to be capable of paying compensation, it must so notify the Commission, in which case the compensation obligation reverts to the FIXC beginning with the first quarter that begins 30 days or more after the notification. If the SBR fails to submit a timely certification, then the FIXC is responsible for paying compensation for every quarter until the quarter that begins 30 days after a further certification. If a SBR recertifies after missing a certification deadline or notifying the Commission that it was discontinuing compensation, the recertification should not be valid until the first quarter that begins 90 days after the recertification.

The certification should include an audit report that meets the requirements specified below. The auditor should be required to submit separately a statement to the Commission swearing that the auditor conducted the audit as described in the report, and that the results of the audit are as described in the report. Unlike a financial audit, an untruthful compensation audit is unlikely to result in significant liability to shareholders or others. Therefore, the Commission must ensure that, at a minimum, an auditor risks significant administrative and criminal penalties for false statements to the FCC if the auditor fails to conduct the audit with the requisite degree of care.

II. AUDIT REQUIREMENTS

The audit must be conducted by a firm that is qualified to conduct network engineering evaluations as well as financial audits. In addition, the auditor must be familiar with the Commission's payphone compensation rules. The auditor must not be a firm that also conducts regular financial audits for the SBR. The name of the auditor should be disclosed in advance of the audit.

The auditor must conduct tests of the SBR's compensation tracking, recordkeeping, and payment systems that test whether the SBR actually does accurately track and pay for compensable calls. The minimum content of the audit report should be as follows.

A. Description of Compensation Tracking and Payment Systems

The report should identify all of the SBR's toll-free numbers and describe in detail the SBR's compensation tracking, recordkeeping, and payment systems. *In addition to* the items included in MCI's *ex parte*, the auditor's report must include the following:

One portion of the report should provide a complete statement of the SBR's "business rules" for implementing compensation payments. *In this statement, the* auditor should explain (1) what criteria are used to identify calls originating from payphones, (2) what criteria are used to identify compensable payphone calls, and (3) what criteria are used to identify incomplete or otherwise noncompensable calls. The description should exhaustively address every type of call reaching the SBR's call processing platform or other points that may be reached by dialing the SBR's toll-free numbers. *The auditor should also explain the conditions, if any, under which the SBR*

makes flat-rate surrogate payments. The auditor should identify the clearinghouse, if any, that the SBR uses to make compensation payments, and describe the types of information that the SBR or its clearinghouse requests from PSPs in order for a PSP to receive compensation payments. The report should also identify the criteria and procedures used by the SBR to determine which lines do and do not qualify for compensation payments, and which PSP should receive payment for calls originating from a given payphone.

This portion of the report should also describe what steps are taken to ensure that FLEX ANI digits or other appropriate identifiers are transmitted with payphone calls, how compensable and noncompensable calls are tracked, what kinds of records of payphone calls are generated, and how long each set of records is maintained

Finally, the report must describe each switching, data processing, and data storage system that is used for call tracking or compensation payment purposes, including systems operated by another carrier or independent contractor. The report should identify each carrier or independent contractor involved, and the systems for which they are responsible

B. Testing of Tracking and Payment Systems

The auditor must also conduct tests of the tracking and payment systems, using standardized procedures for testing the accuracy of network call processing and billing systems. The auditor must inspect and test all of the systems used for purposes of call tracking and compensation payment, including systems operated by another carrier or independent contractor. The report should describe in detail each test performed so that the Commission can satisfy itself that each portion of the SBR's tracking and payment system was examined and tested.

The tests should include a statistically valid sample of actual test calls placed from a random sample of payphones throughout the geographic area served by the SBR. The test calling period must last at least 90 days for an SBR's initial certification, and 180 days for each subsequent certification. The test calls must be invisible to the SBR, in other words, the SBR should not know in advance when or where test calls are being placed, and no information should be transmitted with the calls that identifies them as test calls. The dates, times of day, location, duration and toll-free numbers used to place the calls should be randomly selected based on the actual distribution of calls handled by the SBR. The various procedures followed by the test caller – e.g., hangup after reaching the platform, place a call that is not answered, place a call that is answered, respond to each of the customer service prompts available at the platform – should also be representative of the actual alternatives available to a caller.

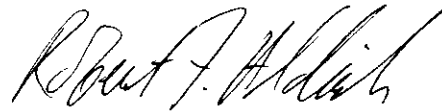
The auditor should report the results of each test, and state the grade of service indicated by the test results. In order for the SBR to be in compliance, the grade of service attained by the compensation system must equal the grade of service of the SBR's service as a whole. In other words, if the SBR's network is able to process an

average of 99.9% of the calls dialed, it must also be able to accurately track and pay compensation for 99.9% of compensable dial-around calls reaching its network.

C. Access to the Auditor's Report

The complete audit report must be available to PSPs for review subject to the Commission's standard protective agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich". The signature is fluid and cursive, with the first name "Robert" being more prominent.

Albert H. Kramer
Robert F. Aldrich

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